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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Appellant,

v.

SHAWN PATRICK GREENBLATT,

Defendant and Appellant.

E046095

(Super.Ct.No. RIF119725)

OPINION

APPEAL from the Superior Court of Riverside County. Thomas C. Hastings, Judge. (Retired judge of the Santa Clara Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed in part and reversed in part with directions.

Rod Pacheco, District Attorney, and Kelli Catlett, Deputy District Attorney, Attorneys for Plaintiff and Appellant.

Kevin D. Sheehy, under appointment by the Court of Appeal, for Defendant and Appellant.

A jury found defendant Shawn Patrick Greenblatt guilty of possession of a controlled substance, to wit, methamphetamine (Health & Saf. Code, § 11377, subd. (a)) (count 4).<sup>1</sup> Defendant admitted that he had sustained two prior strike convictions (Pen. Code, §§ 667, subd. (c), (e)(2)(A), 1170.12, subds. (b), (c)(2)(A)) and five prior prison terms (Pen. Code, § 667.5, subd. (b)). After the trial court dismissed one of defendant's prior strike convictions pursuant to Penal Code section 1385, defendant was sentenced to a total term of six years in state prison: the middle term of two years, doubled to four years due to the prior strike conviction, plus two consecutive one-year terms for two of the five prior prison term enhancements; three prior prison terms were ordered stayed. Both parties appealed.

The People contend (1) the trial court abused its discretion when it dismissed one of defendant's prior strike convictions; and (2) the trial court erred when it ordered defendant's three prior prison term enhancements stayed. Defendant contends the trial court erred when it denied him presentence conduct credits.

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<sup>1</sup> The jury found defendant not guilty of unlawfully taking a vehicle with a prior vehicle theft conviction (Pen. Code, § 666.5, subd. (a); Veh. Code, § 10851, subd. (a)) (count 1) and receiving a stolen vehicle (Pen. Code, § 496d, subd. (a)) (count 2). The jury deadlocked on count 3, transportation of a controlled substance, to wit, methamphetamine (Health & Saf. Code, § 11379, subd. (a)), and the court declared a mistrial as to that count. That count was later dismissed on the People's motion.

We agree that the trial court erred in staying three prior prison term enhancements and denying defendant conduct credits. We reject the People's remaining contention.

## I

### FACTUAL BACKGROUND

On October 6, 2004, an officer in an unmarked vehicle was looking for defendant. He spotted defendant driving a truck and followed him. Defendant pulled over; the officer drove past him and pulled over some distance away. Defendant then drove by the officer's vehicle very slowly, making eye contact with the officer. Surveillance of defendant's vehicle was picked up by a second officer. At one point, defendant pulled his truck quickly into a driveway, exited the vehicle, and went into the home. The home belonged to Maria Guzman. Guzman and her daughter were at the home at the time. They did not know defendant and tried to get him to leave. Officers arrived and arrested defendant as he exited the home. Incident to his arrest, the officers searched defendant and found a plastic baggie containing 0.19 grams of methamphetamine.

The truck, which defendant had been driving, had been reported stolen a few months earlier. Inside the vehicle, police found six bullets within a leather pouch inside a door compartment and a hunting knife and drug paraphernalia in the center console.

## II

### DISCUSSION

#### A. *Motion to Dismiss Prior Strike Convictions*

Prior to sentencing, the probation officer recommended that defendant be denied probation and that he receive a middle term of two years for his current conviction of possessing methamphetamine, considering the factors in aggravation and mitigation. The circumstances in aggravation cited by the probation officer were (1) defendant's prior convictions as an adult are numerous or of increasing seriousness; (2) defendant was on parole when he committed the current offense; (3) defendant had served a prior prison term; and (4) defendant's performance on probation or parole had been unsatisfactory. In mitigation, the probation officer noted, "The defendant was suffering from a mental or physical condition that significantly reduced culpability for the crime. The defendant appears to have a severe drug addiction. This appears to have been documented by Delancey Street Foundation."

The probation report notes defendant's criminal history as follows: In February 1994, defendant was convicted of vehicle theft (Veh. Code, § 10851, subd. (a)) and illegal possession of a loaded firearm (Pen. Code, § 12031, subd. (a)). He was sentenced to probation with 240 days in county jail. He violated probation twice and was eventually sentenced to 16 months in state prison. In May 1994, defendant was convicted of grand theft (Pen. Code, § 487, subd. (a)) and placed on probation with 120 days in jail. In April 1995, defendant was convicted of possession of a controlled substance and

sentenced in 16 months in state prison. In May 1996, four months after being paroled, defendant was convicted of false representation of identity to a peace officer (Pen. Code, § 148.9, subd. (a)) and vehicle theft with a prior vehicle theft (Pen. Code, § 666.5, subd. (a); Veh. Code, § 10851, subd. (a)). He was then sentenced to three years in state prison. In August 1998, again just four months after being paroled, defendant was convicted of failure to comply with a lawful order of a peace officer (Veh. Code, § 2800) with a prior prison term (Pen. Code, § 667.5). Defendant's three-year prison sentence was suspended, and he was committed to the California Rehabilitation Center (CRC) for treatment of his drug addiction. However, after seven months at CRC, defendant was deemed unsuitable for the addiction program due to his possible affiliation with a prison gang; his suspended sentence was imposed in June 1999. In September 2002, defendant was convicted of his two strike offenses, burglary (Pen. Code, § 459) and making criminal threats (Pen. Code, § 422), and sentenced to two years in state prison. He was released on parole in June 2003 but violated parole. At the time of conviction in this matter, defendant had two additional misdemeanor cases trailing, one for damaging a prison or jail (Pen. Code, § 4600, subd. (a)) in June 2007 and one for failing to stop for an accident where property damage occurred (Veh. Code, § 20002, subd. (a)) and failure to appear (Veh. Code, § 40508, subd. (a)).

The probation officer's report also noted defendant's circumstances. Defendant was 33 years at the time of the report and had suffered from schizophrenia, bipolar disorder, and attention-deficit/hyperactivity disorder since childhood, for which he was

being treated with medication. He was a current drug addict and a chronic abuser of multiple drugs, including heroin, cocaine, amphetamine, phencyclidine (PCP), and marijuana, and had been since about the age of 12. Though defendant had admitted to associating with a gang in the past, he claimed that since 1999, he had no gang associations. He had gang tattoos over his body.

When interviewed by the probation officer, defendant admitted to being a “screw-up” and making “bad choices” in the past. He claimed that he wanted to change his life for the better, stay away from drugs and “bad influences,” and complete his educational goals. He attributed his problems to his drug usage being “out of control.” The probation officer opined that in speaking with defendant, defendant appeared to “now . . . have a good understanding that the drugs he used over a period of time have affected him negatively and also realizes he needs to abstain from using them.”

The probation officer had contacted the Delancey Street Foundation and was informed that defendant was ineligible for the program due to his psychological history and medication needs, as the program did not have professional doctors, therapists, or psychologists who would be able to administer defendant’s medication needs.

On April 28, 2008, defendant filed a motion to dismiss one or both of his prior strike convictions pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*). The motion set out the standards in dismissing a strike and the factors outlined in *People v. Williams* (1998) 17 Cal.4th 148, 161 (*Williams*). The People subsequently

filed opposition, noting defendant was the type of recidivist offender the three strikes law was intended to punish.

The hearing on the motion was held on May 16, 2008. Following a lengthy discussion of the motion, in which both counsel pointed out the factors outlined in *Williams*, the trial court granted defendant's motion, after considering all of the documentation and facts and circumstances, to dismiss one of his two prior strike convictions.

The People argue the trial court abused its discretion by striking one of defendant's 2002 prior serious felony convictions pursuant to *Romero*. We disagree.

Penal Code section 1385, subdivision (a), authorizes a trial court to act on its own motion to dismiss a criminal action "in furtherance of justice." (*Romero, supra*, 13 Cal.4th at p. 530.) This power includes the ability to strike prior conviction allegations that would otherwise increase a defendant's sentence. (*People v. Garcia* (1999) 20 Cal.4th 490, 496.)

A trial court's decision whether or not to dismiss or strike a prior serious and/or violent felony conviction allegation under Penal Code section 1385 is reviewed for abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 376.) "In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, "[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve the legitimate sentencing objectives, and its discretionary

determination to impose a particular sentence will not be set aside on review.”

[Citation.] Second, a ““decision will not be reversed merely because reasonable people might disagree. ‘An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.’” [Citation.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it.” (*Id.* at pp. 376-377; see also *People v. Myers* (1999) 69 Cal.App.4th 305, 309.) We may not substitute our conclusions for those of the trial court. (*People v. McGlothin* (1998) 67 Cal.App.4th 468, 477.)

The California Supreme Court explained, “In light of this presumption, a trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances. For example, an abuse of discretion occurs where the trial court was not ‘aware of its discretion’ to dismiss [citation], or where the court considered impermissible factors in declining to dismiss [citation].” (*People v. Carmony, supra*, 33 Cal.4th at p. 378.) Discretion is also abused when the trial court’s decision to strike or not to strike a prior is not in conformity with the “spirit” of the law. (*Williams, supra*, 17 Cal.4th at p. 161; *People v. Myers, supra*, 69 Cal.App.4th at p. 310.)

But “[i]t is not enough to show that reasonable people might disagree about whether to strike one or more of his prior convictions. Where the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court’s ruling, even if we



might have ruled differently in the first instance. [Citation.]” (*People v. Myers, supra*, 69 Cal.App.4th at p. 310.) The touchstone of the analysis must be “whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*Williams, supra*, 17 Cal.4th 148, 161; see also *People v. Garcia, supra*, 20 Cal.4th at pp. 498-499.)

Thus,”[a] trial court abuses its discretion when it dismisses a prior conviction solely to accommodate judicial convenience, due to court congestion, because a defendant pleads guilty” (*People v. Carrasco* (2008) 163 Cal.App.4th 978, 993), or due to “a personal antipathy for the effect that the three strikes law would have on defendant” (*People v. Dent* (1995) 38 Cal.App.4th 1726, 1731), or when it takes little or no account of the particulars of defendant’s background, character, and prospects (*People v. Thornton* (1999) 73 Cal.App.4th 42, 49).

The People argue that the trial court abused its discretion because it “did not meaningfully consider the *Williams* factors” but based its decision on “bare antipathy to the three strikes law and sympathy towards this defendant.” The argument mischaracterizes the court’s reasons for striking the strike, and the record does not support this contention.

The trial court did not strike the strike because it felt antipathy to the three strikes law or sympathy for defendant, or any other improper reason. On this record, we cannot conclude the trial court abused its discretion in striking one of defendant's prior strike convictions. The relevant considerations supported the trial court's ruling, and there is nothing in the record to show that the court exercised its discretion on improper reasons or that it failed to consider and balance the relevant factors, including defendant's personal and criminal background. In fact, the record clearly shows the court was aware of its discretion, aware of the applicable factors a court must consider in dismissing a prior strike, and appropriately applied the factors as outlined in *Williams*. The court read and considered the *Romero* motion, the People's opposition thereto, and the probation officer's report.

During its statements of reasons, the court posed the question, "[A]re we to the point in our society where we trigger a third-strike case for possession of one-half a gram of methamphetamine?" The court answered the question in the negative, after noting that it had to consider defendant's present conviction, the facts of the present conviction, his prior convictions, his prior strikes, his propensity to reoffend in the future, and the danger to society. The record is clear that the court was carrying out the mandate of *Williams* by considering the nature and circumstances of defendant's present conviction; his prior serious felony convictions; and his background and character, including his long mental illness, along with the other criteria, in exercising its discretion. (*Williams, supra*, 17 Cal.4th at p. 161.)

Contrary to the People’s suggestion, this was not a case where the court failed to balance the factors outlined in *Williams* and based its decision on personal antipathy for the effects the three strikes law would have on defendant. The trial court weighed all the factors and acknowledged defendant had not led a blameless life. The court was fully aware of the balancing that must take place to consider the rights of society, as represented by the People, in enforcing the sentencing scheme and in prosecuting defendant. The court even appears to have accepted the People’s position that defendant’s criminal activity escalated and that he possibly posed a danger to society.

The court weighed the arguments advanced by both sides. The court did not disagree or reject the points raised by the People but exercised its discretion to strike one of the strikes after balancing the factors outlined in *Williams*. The court did not rely on any inappropriate factors.

On this record, we cannot find that the court’s decision was so irrational or arbitrary that no reasonable person could agree with it.

**B.     *Staying of Prior Prison Term Enhancements***

The People next contend, and defendant correctly concedes, that the trial court erred when it stayed defendant’s three of five prior prison term enhancements.

A trial court must either impose or strike a prior prison term enhancement pursuant to Penal Code section 667.5, subdivision (b). (*People v. Langston* (2004) 33 Cal.4th 1237, 1241 [“the trial court may not stay the one-year enhancement, which is mandatory unless stricken”]; *People v. Campbell* (1999) 76 Cal.App.4th 305, 311 [“the

court must either impose the prior prison enhancements or strike them”].) “The failure to impose or strike an enhancement is a legally unauthorized sentence subject to correction for the first time on appeal. [Citations.]” (*People v. Bradley* (1998) 64 Cal.App.4th 386, 391.)

The trial court must provide a rationale for using its discretion to strike a mandatory prior conviction enhancement. (*People v. Jordan* (2003) 108 Cal.App.4th 349, 368.) Here, though the trial court granted defendant’s motion to strike one of the prior felony convictions and gave an indication that it intended to be lenient with defendant or impose a lesser sentence, it gave absolutely no reason for staying the subject enhancements. The court merely stated, “As to the prior prison felony convictions, one, two, and three . . . you’re ordered to serve one year, and that one year as to each of those terms is stayed.” Based on this statement, it is impossible to tell whether the trial court would have struck or imposed sentence on the enhancements had it been aware it could not stay the sentence.

We must reverse the unauthorized sentence and remand for resentencing. On remand, the trial court must either strike defendant’s prior prison term enhancements pursuant to Penal Code section 1385, with stated reasons for doing so, or impose the enhancements consecutively to the others and to the principal count as required by Penal Code section 667.5, subdivision (b). We express no opinion on whether the trial court should, acting within its discretion, strike one or more of the prior prison term enhancements on resentencing.

C. *Conduct Credits*

At the sentencing hearing, the trial court awarded defendant presentence credits of 1,350 actual days of custody. However, the court, based on a misapprehension from defense counsel that the three strikes law precludes defendant from receiving any conduct credits, did not award defendant any conduct credits.

Defendant contends that the trial court erred in failing to award defendant any conduct credits under Penal Code section 4019. The People concede his custody credits should be modified.

Penal Code section 4019 is the general statute governing credit for presentence custody. Absent contrary authority, “a defendant receives what are commonly known as conduct credits toward his term of imprisonment for good behavior and willingness to work during time served prior to commencement of sentence. [Citations.]” (*People v. Thomas* (1999) 21 Cal.4th 1122, 1125 (*Thomas*).)

The court in *People v. Williams* (2000) 79 Cal.App.4th 1157 awarded presentence custody credit under Penal Code section 4019 where the defendant received an indeterminate term. (*People v. Williams, supra*, at pp. 1175-1176.) In *People v. Buckhalter* (2001) 26 Cal.4th 20, our Supreme Court described its decision in *Thomas* as holding that “restrictions on the rights of Three Strikes prisoners to earn term-shortening credits do not apply to confinement in a local facility prior to sentencing. We emphasized that when limiting the credit rights of offenders sentenced thereunder, the Three Strikes law [citations] expressly refers only to ‘postsentence . . . credits,’ i.e., those

“‘awarded pursuant to [a]rticle 2.5’” [citation] and ‘does not address presentence . . . credits’ for Three Strikes defendants [citation].” (*Buckhalter*, at p. 32, italics omitted.)

Our Supreme Court in *In re Cervera* (2001) 24 Cal.4th 1073 discussed prison conduct credits (not the presentence credits at issue in the case at bench) and held that a defendant sentenced to an indeterminate life term under the three strikes law was not entitled to prison conduct credits for use against his or her mandatory indeterminate term of life imprisonment. (*Id.* at pp. 1076, 1080.) *Cervera* only applies to postconviction custody credits. (*Thomas, supra*, 21 Cal.4th at pp. 1125-1126.) Hence, presentence conduct credits are available to a defendant sentenced under the three strikes law.

Since the matter must be remanded for the reasons stated in part II.B., *ante*, the trial court is directed to recalculate defendant’s presentence custody credits. We remind the trial court that presentence custody credit is calculated under Penal Code section 4019 “‘by dividing the number of days spent in custody by four and rounding down to the nearest whole number. This number is then multiplied by two and the total added to the original number of days spent in custody. [Citation.]’ [Citation.]” (*People v. Williams, supra*, 79 Cal.App.4th at p. 1176, fn. 14.)

### III

#### DISPOSITION

That portion of the judgment staying imposition of the punishment for the three prior prison term enhancements under Penal Code section 667.5, subdivision (b), is reversed. The trial court is directed to hold a new sentencing hearing and either impose sentence on the enhancements or strike them in accordance with the dictates of Penal Code section 1385. The trial court is also directed to recalculate defendant's presentence custody credits and award defendant conduct credits in accordance with this opinion. In all other respects, the judgment is affirmed.

RICHLI

Acting P. J.

We concur:

GAUT

J.

MILLER

J.